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In The

Supreme Court of the United States

October Term, 1968

No. ~~1247~~ 1248

HESMER FOODS, INC.,
Petitioner

— vs. —

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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In The

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October Term, 1968

No. .....

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— vs. —

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Hesmer Foods, Inc., prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Seventh Circuit, granting enforcement of an order of the National Labor Relations Board without an opinion stating the grounds for granting enforcement.

OPINIONS BELOW

The Court of Appeals for the Seventh Circuit rendered no opinion as such in this case, but rather on November 17, 1967 made the following entry:

"This court having considered the record in

> this case transmitted by the National Labor Relations Board, as well as the briefs filed by the respective parties herein, and having heard oral arguments in open court by counsel for said parties, and having taken the case under advisement for decision, the court has conferred thereon and is now of the opinion and accordingly holds and adjudges that the order of the National Labor Relations Board issued on October 26, 1965 against Hesmer Foods, Inc., respondent, be enforced in full and that a decree accordingly be entered herein."

On the basis of this entry a decree was issued December 20, 1967 and subsequent to that date a petition to stay the mandate was timely filed and this petition is filed pursuant thereto. The Decision and Order of the National Labor Relations Board appears in the Record. (R.J.A. 1-21)

JURISDICTION

The Jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code.

QUESTION PRESENTED

Whether the Court below was correct in finding that Petitioner violated Section 8(a)(1) of the Labor-Management Relations Act and Section 8(a)(3) of the Labor Management Relations Act, where the National Board's opinion (the sole and only opinion in this case) was based on the following inferences:

(1) Because Petitioner runs a small plant it

knew of union activity and was motivated at all times by unlawful motive;

(2) Because Petitioner failed to call a witness it made available to the parties, an inference was raised that if this witness testified it would be unfavorable to Petitioner;

(3) The use of the term "agitator" by Petitioner raised an inference of knowledge of union activity and unlawful motive;

(4) Petitioner's use of two letters written over two months after the events, an issue not alleged to be unlawful, raised an inference of unlawful motive;

(5) Petitioner's showing, through its own witnesses and those of the Board, that its motive concerned the anti-negro feeling of 5 of its employees did nothing to rebutt the above inferences.

(6) Based on the above inferences and refusal to discuss the effect of Petitioner's defense, the Board found its General Counsel had proven a violation of the Act by a preponderance of the evidence in the first instance and by substantial evidence on the record considered as a whole.

Because of the above, a substantial federal question is raised as to whether or not, as a matter of law, the substantial evidence test has been "misapprehended or grossly misapplied" by the Board in this case. **Universal Camera Corporation** v. **N.L.R.B.**, 340 U.S. 474, 491, 71 S.Ct. 456, 466, 95 L.Ed. 456(1950); **N.L.R.B.** v. **Walton Mfg. Co.**, 369 U.S. 404, 408, 82 S.Ct. 853, 855-56, 16 L.Ed.2d 141(1962).

STATUTE INVOLVED

Section 8(a)(1) and (3) of the Labor-Management Relations Act, 29 U.S.C 158(a)(1) and (3), 61 Stat. 140 provides as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor

organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or rtaining membership;

Section 8(c) of the Labor-Management Relations Act, 29 U.S.C. 158(c), 61 Stat. 140 provides as follows:

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Section 10(c)(e) of the Labor-Management Relations Act, 29 U.S.C. 160(c),(e), 61 Stat. 146, provides as follows:

(c) The testimony take by such member, agent, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Boaord shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor

practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complain has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, of the payment to him of any back pay(if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners there-

of, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(e) The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provoided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or ganecy, shall be considered by the court, unless the failure or neglect to urge

such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the saitsfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

STATEMENT.

Hesmer Foods, Inc. is a food processing firm located in Evansville, Indiana. The company has two plants in that city, one located on North Stockwell Road and the other on Stringtown Road. The events involved in this case took place at the Stockwell Road plant, which produces barbecue products distributed under the Hesmer label. (R.J.A. 2, 48) During the first part of October, 1965 a union organization campaign began among Petitioner's employees. (R.J.A. 2, 45-6) Prior to this time, or during the month of September, 1965, Petitioner became concerned about the fact that it had failed to ever employ any negroes at its Stockwell Road plant as it felt might be required by the federal Civil Rights Act. (R.J.A. 82) As part of program designed to cure this problem, Petitioner decided to hire negroes at the Stockwell Road plant. With this in mind it decided to bring two negroes to work at its plant on October 14, 1965 and this, in fact, was done. (R.J.A. 89)

On the evening of October 11, 1965 Petitioner's president had occasion to be passing through the Stockwell Road plant when an employee approached him concerning this question: "Do we have to hire niggers here at Hesmer's?" (R.J.A. 83) After some conversation, this employee told Petitioner's president that another employee would place a sign on the restroom door "Niggers not wanted," if Petitioner hired negroes. (R.J.A. 83) This employee also stated three or four other employees of Petitioner held similar views. (R.J.A. 75) As a result of this disclosure, Petitioner's president held a meeting with his supervision and a decision was made to discharge the employees management felt might cause trouble because of the planned

integration of the Stockwell Road plant. The final decision, however, was made in one instance by Petioner prior to the time of the other discharges. (R.J.A. 84-5) This was done and this proceeding was instituted, although approximately two months after these events Petitioner did send two letters to its employees stating opposition to organization by a union—these letters were not alleged to be violations of the Act. (R.J.A. 27-29)

The Board affirmed its Trial Examiner's Decision without comment. In turn, this Decision rested on the propositions that because Petitioner ran a small plant, it had failed to call a witness, its president had used the term "agitator" at the time of one of the discharges, had written letters to its employees showing opposition to unionization two months after the discharges and regardless of Petitioner's stated cause for the discharges of strong race prejudice that Petitioner had fired five of its employees in violation of Section 8(a)(3) of the Labor-Management Relations Act. (R.J.A. 1-16) Petitioner filed exceptions to this Decision which was adopted in its entirety by the National Labor Relations Board. Later, the Board filed a petition for enforcement of its order and this petition was granted on the basis of the entry set forth above.

REASON FOR GRANTING THE WRIT.

An Important Federal Question is Presented by the Proceedings Below as a Matter of Law Concerning the Burden of Proof the National Labor Relations Board Must Sustain in Establishing a Violation of the Labor-Management Relations Act Because of the Board's

Gross Misapprehension and Gross Misapplication of the Substantial Evidence Test.

It is quite clear that in the usual case, inferences and questions of credibility should be left to either the National Labor Relations Board or one of its Trial Examiners or trial judges, since it is not the role of the courts to supplant the functions of an administrative agency such as the National Labor Relations Board. However, even though only a few cases turn on such question, "when obvious injustice has been done, a court can turn grossly erroneous fact inferences into errors of law. The court thereby removes the issue from the area of administrative discretion. The elusive nature of the substantial evidence test is necessaray in order to permit the court to correct a real injustice." 48 CORNELL L. Q., "Substantial Evidence Test," 309, 316(1963) dealing with the application of **Universal Camera Corporation** v. **N.L.R.B.,** 340 U.S. 474,71, S.Ct. 456,95 L.Ed. 456(1960); **N.L.R.B.** v. **Walton Mfg. Co.,** 369 U.S. 404,82 S.Ct. 853,16 L.Ed.2d 141(1962). It is, thus, Petitioner's position that in this case the Board acted in an unreasonable fashion in that its inference was both unreasonable and contrary to fact to such a degree as to be "grossly erroneous." Similarly, the Circuit Court acted in a manner contrary to the directions of this Court in **N.L.R.B.** v.**Brown,** 380 U.S. 300, 85 S.Ct. 980, 13 L.Ed.2d 855(1965) wherein it was stated at 380 U.S. 291,92, 85 S.Ct. 988: "Reviewing courts are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

What, then, is clearly unreasonable or grossly erroneous about the Board's decision in this case. In its

decision the Board in adopting its trial examiner's findings in their entirety found that because Petitioner failed to call one of its supervisors the testimony given by that supervisor would have been unfavorable to its position. This is much emphasized. (R.J.A. 10-12) The record without contradiction, however, shows no reason for the application of the rule involved in such cases, which is that where the failure of a witness to testify is unexplained and the witness is not made available to the parties, an inference arises against the party failing to call or make the witness available that his testimony would be unfavorable. The portion of the record removing the proper use of this inference from the case is as follows: "Trial Examiner: 'Was Mr. Johann here earlier in the day? Mr. Yocum: Yes, he was. Trial Examiner: Is he here now? Mr. Yocum: I don't believe he is. Trial Examiner: All right. You aren't calling him? Mr. Yocum: No. But we would make him available." (R.J.A. 99) Unless it is the policy of the Board to apply an inference where the basis for its application does not exist it would seem clear it cannot have benefits of this inference in this case. **N.L.R.B.** v. **Wix Corporation,** 309 F.2d 826, 832, fn. 6(CCA-4 1962); **N.L.R.B.** v.**Combined Century Theatres, Inc.,** 278 F.2d. 306, 308-06 (CCA-2 1960) In any event, all this man could testify to would merely be cumulative and no unfavorable inferences can be drawn under such circumstances. **Georgia Southern & Florida Railway Company** v. **Perry,** 326 F.2d 921 (CCA-5-1964); and where properly applied this reference is no substitute for evidence; nor does it shift the burden of proof. 316 J.S., "Evidence," S15 bc. p 860; Amd., 70 R.L.R. 1326.

Similarly, the Board inferred knowledge of union activity and imporper motive from the fact that Peti-

tioner runs a small plant. Of course, this is obviously inference upon inference—knowledge of necessity results in unlawful motive—yet most importantly nothing else in the record supports this directly and, in fact, as this Court judicially knows, Evansville, Indiana is a city of approximately 148,000 people. The so-called small plant rule only applies where an employer operates a small plant in a small community where "other affirmative evidence" directly shows the employer in fact knows of the union activity of his employees. **N.L.R.B.** v. **Joseph Antell, Inc.,** 358 F.2d 880, 882(CCA-1 1966); **N.L.R.B.** v. **Robert Alvaro Manufacturing, Inc.,** 327 F.2d 998, 999(CCA-1 1964; **N.L.R.B.** v. **Illinois Tool Works,** 119 F.2d 356, 360(CCA-7 1945). The record also shows no basis for application of the small plant rule. Although discredited, Petitioner's president directly denied such knowledge. (R.J.A. 96) At the time of the discharges in issue in this case and before, Petitioner never received any form of direct communication from the union attempting to organize its employees, all union activity was covert in the sense no buttons, insignia, etc., were worn by Petitioner's employees and there is no evidence of any direct mention of union activities to employees by any person in a responsible position with Petitioner. (R.J.A. 41, 45, 56-7,63,87)

Next, the Board found that Petitioner's use of the word "agitator" at the time of the discharge of one of he alleged discriminatees was enough to raise an inference of unlawful motive. This, however, assumes there is nothing in the record rebutting this inference, yet this is not the case. The specific finding is itself most equivocal: "The term 'agitator' appears to have referred to Bunker's (one of the alleged discrimi-

natees) union activity." (R.J.A. 15) The record affirmatively shows the use of this term in fact does not relate to union activity but to Petitioner's knowledge of this man's strong racial prejudice: "Isn't it true that of his man's strong racial prejudice: "Isn't is true that you said that Bunker was going to put a sign on the restroom door, 'No niggers allowed in here?' A. Yes, I did." (R.J.A. 75) How can an inference out of nothing be reasonable, when the record without contradiction and affirmatively shows a reasonable basis for the use of the term which is lawful.

As a means of raising an inference of unlawful motivation on the part of Petitioner, the Board found two letters sent to its employees over two months after the date of the discharges indicated unlawful motive or hostility on the part of Petitioner. (R.J.A. 27-29) After Respondent objected to the introduction of these documents into evidence on the ground they could not be used as evidence because they were not alleged to be violative of the Act and, thus, could not be used for this purpose, these statements were admitted into evidence. This was improper because:

> "In **Pittsburgh S. C. Co. v. N.L.R.B.**, 180 F.2d 731, 735 affirmed 340 U.S. 498, 71 SCt. 453, 95 L.Ed. 479(C.A. 6) the Court of Appeals, under somewhat similar circumstances stated With reference to the right of free speech the legislative history of the Taft-Hartley Act was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor

practices'." **Indiana Metal Products Corp.** v. **N.L.R.B.**, 202 F.2d 613 (CCA-7 1953)

As the Board's own brief before the Court of Appeals shows, it has admitted that the findings as to unlawful motive are negative, in that they rest solely on disbelief, not affirmative evidence. (R.B.B. 18, fn. 16).

The law is clear to the effect that in testing either the substantiality of the Board's decision or the preponderance of the evidence found by one of its Trial Examiners the following must be considered:

> "Whether or not it was ever permissable for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory or review and bars its practice." **Universal Camera Corp.** v. **N.L.R.B.**, 340 U.S. 474, 487,71 S.Ct. 456, 464,95 L.Ed. 456(1950).

The Board ignored the evidence in the record showing the five discharges were not motivated by anti-union considerations. The record shows Petitioner's decision to hire negroes was made prior to the advent of any union activity among its employees. (R.J.A. 35) The record also shows the consideration was racial prejudice among a few of Petitioner's employees and the effect it might have when two negroes were brought into the plant. (R.J.A. 74-5) Ultimately, all that is left of the Board's decision is a finding that a dispropor-

tionate number of union adherents were chosen for discharge, yet when considered in light of the fact that Petitioner's total employment compliment at both plants was approximately 60 this is just not supported by the entire record. (Compare R.J.A. 12 with R.J.A. 80)

CONCLUSION

For these reasons Petitioner asks that this Court grant its petition for a writ of certiorari and for all proper relief.

Respectfully submitted,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Friday, November 17, 1967

Before

Hon. ELMER J. SCHNACKENBERG, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge

NATIONAL LABOR RELATIONS BOARD,	Petitioner,	On Petition for Enforcement of an
No. 16306	vs.	Order of the National
HESMER FOODS, INC.,	Respondent.	Labor Relations Board

This court having considered the record in this case transmitted by the National Labor Relations Board, as well as the briefs filed by the respective parties herein, and having heard oral arguments in open court by counsel for said parties, and having taken the case under advisement for decision, the court has conferred thereon and is now of the opinion and accordingly holds and adjudges that the order of the National Labor Relations Board issued on October 26, 1966 against Hesmer Foods, Inc., respondent, be enforced in full and that a decree accordingly be entered herein.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 16306
HESMER FOODS, INC., Respondent.	)	

DECREE

Before: Schackenberg, Castle and Fairchild, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on October 26, 1966. The Court heard argument of respective counsel on November 8, 1967, and has considere dthe briefs and transcrips of record filed in this cause. On November 17, 1967, the Court being fully advised in the premises, handed down its decision granting enforcement of the Boaord's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Hesmer Foods, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

/s/ ELMER J. SCHNACKENBERG
Judge, United States Court of
Appeals for the Seventh Circuit

/s/ LATHAM CASTLE
Judge, United States Court of
Appeals for the Seventh Circuit

/s/ THOMAS E. FAIRCHILD
Judge, United States Court of
Appeals for the Seventh Circuit

A True Copy:
Teste:

KENNETH J. CARRICK
Clerk of the United States Court of
Appeals for the Seventh Circuit

161 NLRB No. 45 D-9288
Evansville, Ind.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HESMER FOODS, INC.

and Case No. 25-CA-2354

HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On May 6, 1966, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief and the General Counsel filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and the briefs, and the

entire record in this case, and herby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Hesmer Foods, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C. Oct. 26, 1966.

Frank W. McCulloch	Chairman
John H. Fanning,	Member
Gerald A. Brown,	Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

161 NLRB No. 45

TXD-269-66
Evansville, Ind.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

HESMER FOODS, INC.
and
HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO

Case No. 25-CA-2354

MILFORD R. LIMESAND, ESQ., and CLIFFORD L. HARDY, ESQ., for the General Counsel.

JOSEPH A. YOCUM, ESQ., and ARTHUR R. DONOVAN, ESQ., (KAHN, DEES, DONOVAN & KAHN), of Evansville, Ind., for the Respondent.

Before: FREDERICK U. REEL, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

This case, heard in Evansville, Indiana, on March 10, 1966, 1/ pursuant to a charge filed the preceding Oc-

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1/ All other dates herein refer to the year 1965 ..... unless otherwise indicated.

tober 21 and complaint issued December 22, presents the question whether Respondent discharged five employees on October 13 and 14 for having engaged in union activity, including attendance at a union meeting on October 12, or for the reasons advanced by the Respondent at the hearing. Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following:

Findings of Fact

I. The business of the Respondent and the labor organization involved

The pleadings establish, and I find, that Respondent, an Indiana corporation herein called the Company, is engaged at Evansville in the manufacture, processing, packing, and wholesaling of food products, that its operations in interstate commerce place it within the Board's jurisdiction, and that the Charging Party, herein called the Union, is a labor organization within the meaning of the Act.

II. The alleged unfair labor practices

A. Background—the employees at the Company's Stockwell Road plant engage in union activity

The Company maintains two plants in Evansville, one at Stringtown Road and one at Stockwell Road, 5 miles away. The events in this case concern primarily the latter plant. The Company had approximately 22 employees at this plant, of whom 3 or 4 worked on the "night shift" or "clean-up crew," and the balance were on the "first shift." The first shift worked from 7 a.m.

to 4 p.m.; the other men worked from 12:30 p.m. to 9 p.m. Of the five men whose discharges are at issue here, Bunker and Cowan worked on the "clean-up crew; Bruning, Galloway, and Sumrall worked on the other shift. These five men, and two others not involved in this proceeding, signed union cards early in October, and the seven men attended a union meeting on the night of October 12 at the home of a union representative. Bunker, who had distributed the union cards, testified that he had done so on company premises, and that while on company property he had talked to employees about union matters and about union meetings. Cowan, who received his union card from Bunker while at work, also talked to some day-shift employees about signing cards. Galloway, who received his union card from Bunker in the plant, had himself given union cards to two employees, and kept such cards in his locker. Sumrall gave out one union card and spoke to one other employee about signing a card. Bruning, prior to his discharge, had given a card to one man. Company President Mitchell testified, however, that he was unaware of the union activity until October 13, when he learned of it under circumstances described below.

B. Company President Mitchell's conversation with employee Cowan on October 11

On Monday, October 11, Company President Mitchell took a future employee, London Davis, through the Stockwell Road plant. Davis was the first Negro ever to be hired for work at that plant. That evening Mitchell had a conversation with employee Charles Cowan at the plant, in the course of which Cowan expressed his opposition to the hiring of Negroes and added that

other employees, specifically naming Bunker, were likewise opposed. Indeed Cowan told Mitchell (mistakenly, according to both Cowan's and Bunker's testimony) that Bunker had threatened to post an anti-Negro sign on the door of the men's restroom. Mitchell expressed surprise and disapproval at this expression of prejudice, particularly because (according to his testimony) he had previously asked his supervisors, Johann and Ten Barge, to inquire into the employees' attitude, and they had reported there was no prejudice.

C. **Mitchell meets with his supervisors on October 12**

According to Mitchell, he met with Johann and Ten Barge the next morning. (Johann and Ten Barge did not testify.) Mitchell told them of his conversation with Cowan the night before. His testimony continues:

A. I asked who besides this Bunker would be the ones that woul dbe prejudiced towards Negroes working in there. That's when Johann said he felt sure he know who they were. They were a little clique that ran together, he'd been warning their work was no good, and he'd just as soon not have them if they were going to cause that kind of trouble. He warned them several times. He pointed out who they were. I said, "Well, let them work to the end of the work week and let them go. We can't afford to have this kind of trouble."

Q. Who did they mention?

A. They mentioned Sumrall and Bruning and Galloway and I asked them about Bunker and they said he hadn't been there but a week or two. And

> I said, "Well, just let those fellows go when their work week is up," which was the next day. "We don't want them around any more."

Later Mitchell made it clear that Johann had referred only to Bruning, Sumrall, and Galloway as a "clique that fraternized together" who "had caused him a lot of trouble on the day shift." According to Mitchell, he decided at this meeting "to discharge those three and Cowan because he had definitely said that he was against Negroes. These three because their work was unsatisfactory, and we felt they were part of the group that would cause the trouble."

D. The discharges

1. Galloway, Bruner, and Sumrall

The next day, Wednesday, October 13, was the last day of the workweek, which at the Company runs from Thursday through Wednesday. When Bruning, Galloway, and Sumrall went to punch out that afternoon, they found their timecards missing. Johann called them to his desk and said they were discharged. He told the three that because their work had not improved they were being let go (according to Sumrall) or that their work was unsatisfactory (according to Bruning). There is no evidence that any of them had ever been criticized for poor work; indeed, Sumrall testified to the contrary, and Galloway had received a pay raise the week before. 2/ The three men were friends, rode to work together, and visited together

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2/ They apparently had been warned for tardiness, but the Company does not contend that this was a cause of their discharge.

during breaks; they did not, however, associate to any appreciable extent with Cowan and Bunker.

2. Bunker

Upon being notified of the discharges, Galloway went into the plant to tell Bunker, who promptly came to the office and obtained Johann's permission to make a telephone call. Johann gave permission but, while Bunker was dialing, asked to whom the call was directed. Bunker replied, "The Union," to which Johann returned, "What Union?" adding that there was no union there. Bunker said there soon would be, and asked if Johann was going to fire him for union activity too. An argument ensued between Johann and Bunker, during the course of which both men became angry and Johann left the room. Bunker then returned to his work. None of the witnesses at the hearing who also witnessed the exchange between Bunker and Johann testified to any statement or action of Bunker vis-a-vis Johann other than those recited above; Bruning testified that Bunker did not assume a menacing attitude or threatening stance toward Johann, and the other witnesses were not asked about the matter. Johann, although present in the hearing room, was not called as a witness.

Mitchell was in his office with Sales Manager Gorman that afternoon shortly after 4 when Johann entered and told Mitchell that the men had been discharged and that Bunker had threatened him, had used abusive language and gestures, and had accused him of discharging the men for union activity. Mitchell promptly went to Bunker and discharged him. According to Mitchell and Gorman, who was also present, when Bunker asked the reason, Mitchell told Bun-

ker he was fired for being insubordinate to Johann. Bunker and Cowan, who was likewise present, testified that insubordination was not mentioned, and that when Bunker asked if he was fired for union activity, Mitchell called Bunker an "agitator," a term Mitchell did not remember using and was "reasonably sure" he had not used. I find that Mitchell used both expressions. I credit his and Gorman's testimony that he referred to "insubordination," but the testimony of Bunker that he called Cowan's attention to Mitchell's use of the word "agitator," and Cowan's confirmation of this fact although he is again in the Company's employ, lead me to find that this term was also employed. Mitchell also at this time charged Bunker with race prejudice, which Bunker denied, explicitly also denying that he had threatened to put a notice on the restroom door.

3. Cowan

Cowan was in or near the office when Johann discharged the three men. Shortly thereafter, Cowan inquired of Johann as to the reason for the discharges, to which Johann replied that it was none of Cowan's business, and that Cowan should "shut his mouth and get back to work," which Cowan did.

As stated above, Cowan was also present during the conversation between Mitchell and Bunker. According to both Bunker and Cowan, the latter's only participation in the matter occurred when Bunker asked if Cowan had heard Mitchell call Bunker an "agitator," at which point Cowan answered "Yes" and Mitchell asked Cowan: "What have you got in this?" To quote Cowan's rather obscure testimony: "And I said—right

there I didn't say nothing, but him and Jim Bunker was talking, and I said, 'Yes, I have.'"

Mitchell testified that when he fired Bunker, Cowan "said something apparently to Bunker. I though he was talking to me . . . I said 'What did you say?' He said, 'I didn't say anything to you.' And I said, 'Well, you won't be able to say too much to me after this, anyway.'" Mitchell further testified that in his conversation with Cowan on October 11 he had mentioned that Cowan might become an instructor of the new employees on new machines similar to that Cowan was operating. The testimony continues:

TRIAL EXAMINER: When did you make up your mind to fire Cowan?

THE WITNESS: Well, I made it—I'm a slow burner—I made up my mind pretty well that night when he told me what he did about this, about his attitude toward Negroes.

TRIAL EXAMINER: Was it before or after you made up your mind to fire him that you talked about his advancement on the machine?

THE WITNESS: Well, it was after I tried to sell him the idea of being more tolerant bu I didn't get very far.

TRIAL EXAMINER: In what way didn't you get very far?

THE WITNESS: His attitude was obvious that he was prejudiced.

At the conclusion of Mitchell's cross-examination, he testified as follows:

Q. Am I correct you discharged Mr. Cowan because he talked back to you?

A. Yes.

Q. And that was the reason why he was discharged?

A. No.

MR. YOCUM: No.

Q. (By Mr. Limesand) All right—

TRIAL EXAMINER: Just a minute.

MR. YOCUM: You're assuming a fact not in evidence.

TRIAL EXAMINER: Just a minute. Mr. Mitchell, at the time you started this conversation with Bunker, had you already determined to discharge Cowan or not?

THE WITNESS: Yes, I believe that I was ready to let him go because his attitude seemed to me, I couldn't compromise him when I talked to him.

TRIAL EXAMINER: Two nights before the 14th?

THE WITNESS: Two nights before. I wasn't satisfied that his attitude would be right. I was concerned about it. Then when he popped off to me that night, well I knew that his attitude wouldn't be right.

In a pretrial affidavit Mitchell stated that he had decided to fire all five men at the meeting with Johann on October 12. At the hearing Mitchell stated that this was an error, as he had reached no decision with respect to Bunker, and the number should have been four not five.

When Cowan reported for work on the following day, his card was missing. He spoke to Johann, who went to see Ten Barge, the other supervisor, who also did not testify. Ten Barge simply told Cowan "You're released," and told Cowan to get his paycheck.

E. Postdischarge developments

Each of the men involved received with his final paycheck a written statement that he was discharged because "Work was not satisfactory. Insubordination." The following January 4 the Company wrote each of them, asking them to return to work by January 12, 1966, and offering them full reinstatement, but declaring that the Company had not violated the law in discharging them.

On the witness stand Mitchell admitted hostility to the Union. The only allegations of unlawful conduct on the Company's part, however, concerns the discharges described above; the allegation in the complaint of unlawful interrogation was dismissed for want of any supporting evidence.

F. Concluding findings

1. Bruning, Sumrall and Galloway

The issue with respect to each discharge is whether General Counsel sustained his burden of proving that the Company's action was motivated in significant part by the employee's union activity. The Company does not have the burden of proving that it discharged them for the reasons stated by the Company. And it is by now a truism that an employee may lawfully be discharged for no reason at all. On the other hand it is likewise true that employers do not ordinarily dis-

charge men "for no reason at all," and the Company here does not claim to have done so. Moreover, judicial authority warrants inquiry into whether an employer's asserted motive for discharge "withstands scrutiny," and goes so far as to declare that its failure in that regard can furnish support for a finding of unlawful motivation. See, e.g., **N.L.R.B.** v. **Dant**, 207 F. 2d 165, 167 (C.A. 9), and cases there cited. Without overlooking for one moment that the burden of proof rests on General Counsel, I turn first to a consideration of the reasons advanced by the Company for the first discharges—those of Sumrall, Bruning, and Galloway.

According to Mitchell's testimony, these discharges had their genesis in his October 11 conversation with Cowan on the night shift at which Mitchell learned that Cowan was opposed to the hiring of Negroes, and that Cowan said other employees (naming Bunker, perhaps erroneously) were similarly opposed. The next day, according to Mitchell, he told Johann and Ten Barge about the conversation with Cowan, asked who else besides Bunker would be prejudiced against Negroes, and was told that Johann felt sure he knew who they were. Mitchell testified that Johann named Bruning, Sumrall, and Galloway as a "little clique that ran together," whose work was not good, and whom he had warned several times. Mitchell, according to his testimony, said to let them go as "We can't afford to have this kind of trouble." In his pretrial affidavit he stated that he wanted those men out before the Negroes came to work.

The trouble I have with this explanation stems in large part from the failure of Johann to testify. Why

should Mitchell's report on the prejudice of Cowan and Bunker, night-shift employees, lead Johann to the view that those prejudices were shared by three men on the day shift? Nothing in the record establishes any association of consequence between the three day men on the one hand and Cowan and Bunker on the other. And there is not a scintilla of evidence that any of the day men in question was anti-Negro. Moreover, the Company never told them that their allegedly anti-Negro views caused their discharges. On the contrary, they were told orally that they were discharged for unsatisfactory work, and they were told in writing that they were discharged for unsatisfactory work and "insubordination." The record is totally devoid of evidence of their "insubordination," unless the Company felt that engaging in union activity was insubordinate. As to their work, the record contains no evidence that their work was poor or that they had been criticized for bad work; Mitchell testified Johann said he had criticized them, but Johann did not testify and the employees' denials of criticism thus stands uncontradicted by any direct evidence. To be sure, there is some mention of tardiness, but no suggestion that this occurred recently (Galloway had received a pay raise a week before), and it was not mentioned orally or in writing when they were discharged.

Johann's testimony might have shed light on these mysteries. To be sure, General Counsel could have called him as a witness, but it seems more logical to expect the Company to have put him on the stand, particularly following employee testimony that he had not warned them about unsatisfactory work. Compare **N.L.R.B.** v. **Kalof Pulp & Paper Corp.**, 290 F. 2d 447, 451 (C.A. 9); **N.L.R.B.** v. **Elias Bros. Big Boy, Inc.**, 327

F. 2d 421, 427 (C.A. 6); see Note 5 A.L.R. 2d 893, 896, 907-908, 909-911. As the Seventh Circuit stated in **W.H. Miner, Inc.** v. **Peerless Equipment Co.**, 115 F. 2d 650, 655, cert. den. 312 U.S. 687: "Furthermore, the master rightfully suggested that the failure of available officers who had personal knowledge of the facts to testify raised an inference unfavorable to defendants' attempted allocation."

In the absence of Johann's testimony, the record compels disbelief of the Company's story that it fired Bruning, Galloway, and Sumrall because of Johann's alleged report on their race prejudice. The record is clear that their timecards were removed from the rack on October 13. But Cowan's card was not missing until the next day, and according to Mitchell's own testimony he had not decided to fire Bunker until he heard of Bunker's "insubordination." Yet Mitchell had first hand awareness of Cowan's prejudice, and at least as much reason to believe Bunker guilty of that offense as he had to believe it of the three day-shift men. If their cards were pulled and their discharges settled on because of a fear of race prejudice, Cowan's and Bunker's would have been handled the same way at the same time.

I find, in short, that the reasons assigned both at the time of discharge and at the hearing were not the real reason for the discharge of Bruning, Galloway and Sumrall.

These "negative" findings do not of themselves, however, establish General Counsel's case. General Counsel also showed that these men had engaged in union activity on the premises, that they had signed union cards, that they (together with Cowan, Bunker and

two others) attended a union meeting the night before their discharge, that each of them had also given cards to one or two other employees, and that the Company was opposed to the advent of the Union. The question is whether these facts added to the spurious reasons advanced by the Company add up to an affirmative case for the General Counsel. The courts have held that a disproportionate selection of union men for discharge "may under certain circumstances be very persuasive evidence of discrimination." **N.L.R.B.** v. **Bachelder**, 120 F. 2d 574, 578 (C.A. 7), cert, den. 314 U.S. 647; **N.L.R.B.** v. **Shedd Brown Mfg. Co.**, 213 F. 2d 163, 174 (C.A. 7). But the Company argues here that the record contains no evidence whatsoever that it was aware of any union activity at the time it discharged the three day-shift men, and indeed that Mitchell testified positively to the contrary.

Mitchell's testimony, if credited, would compel a finding that the Company was unaware of union activity. This would put the case in the "Discharge for no reason at all" category (if such cases actually do exist), for as shown above I find on this record that the three were not discharged for the reasons given them or for those advanced at the hearing. By the same token, having found against the Company on its asserted grounds, I have in effect stated that I do not credit Mitchell.

With all this, however, we are left with little affirmative evidence in the record that the Company knew or blieved these men to be in the Union. The most that can be said on the affirmative evidence is that Johann (according to Mitchll) referred to them as a clique, and the word "insubordination" appears as a ground for their discharge, although there is not a scintilla

of evidence that they were guilty of any insubordination beyond joining the Union. In addition, the record discloses that each of them engaged in some union activity in the plant at this time, and that the plant consisted of only 18 or 19 men on the day shift, and 3 or 4 on the night shift. This circumstance, when coupled with the employer's admitted hositility to the Union, and with the affirmative evidence that false reasons were given for the discharges, warrants the inference that the true reason, which was concealed, was the union activity. See the recent discussion of the "small plant" doctrine by the First Circuit, enforcing the Board's Order in a case involving a plant of 100 employees. **N.L.R.B.** v. **Joseph Antell, Inc.**, No. 6619, 6657, April 20, 1966, enforcing **Malone Knitting Co.**, 152 NLRB No. 68. I therefore find that the Company discharged. Sumrall, Bruning, and Galloway for union activity. 3/

3/ General Counsel does not contend that if Sumrall, Galloway, and Bruning were jointly opposed to the hiring of Negroes, this would be protected concerted activity on their part. In my view employees acting in concert in support of nondiscrimination in hiring are engaging in protected activity (see **N.L.R.B.** v. **Tanner Motor Livery, Ltd.**, 349 F. 2d 1, 4 (C.A. 9), but employees acting in concert to support racially discriminatory hiring policies would not be protected by the Act as their objective would be contrary to the public policy of the United States as expressed in the Civil Rights Act of 1964. Cf. **Southern Steamship Co.** v. **N.L.R.B.**, 316 U.S. 31, 47.

2. Bunker

The Company contends that Bunker was discharged for being insubordinate to Johann. The Company makes no contention that his work was unsatisfactory (notwithstanding the statement to that effect on the statement accompanying his final paycheck), and makes no contention that his alleged race prejudice (which he denied, but which Cowan, apparently in error, reported to Mitchell) played any role in the discharge. And while the Company admittedly knew of Bunker's union activity when Mitchell fired him, this would not serve to protect Bunker against a discharge for insubordination.

Bunker denied that he was insubordinate. I found him a somewhat untrustworthy witness, evasive and unreliable, and would not rest my decision on his self-serving testimony. But the testimony of the only witnesses to the scene between Bunkr and Johann who testified at the hearing supports Bunker's testimony. Their testimony establishes that when Johann learned Bunker was telephoning the Union an argument ensued between them, that both men became angry, and that Bunker did not menace or threaten Johann.

The exact words of the argument are not reported, beyond Bunker's statement that there will be a union, a reply to Johann's observation that there was no union there. Under circumstances not too dissimilar, an employee was held within the protection of the statute when he referred to his supervisor in most uncomplimentary terms. **N.L.R.B. v. Thor Power Tool Co.**, 351 F. 2d 584 (C.A. 7). A mere showing that Bunker, while engaging in union and concerted activity, got into an argument with a supervisor about unions

falls far short of establishing that he was so insubordinate as to forfeit statutory protection.

Of course, if Bunker had physically threatened Johann the case would be otherwise. But on this record, the proof is that he did not do so. Had the Company wanted to establish the contrary, particularly after Bruning's testimony that Bunker did not assume a threatening attitude, it could have called Johann as a witness.

To be sure, Johann told Mitchell that Bunker had been abusive and threatening. Since Mitchell acted on Johann's report, the case is similar to **N.L.R.B.** v. **Burnup & Sims,** 379 U.S. 21. It matters not, under that case, that Mitchell honestly believed Bunker had threatened Johann, for Mitchell knew that Bunker had been engaged in a protected activity (telephoning the Union to protest the discharges), the basis of the discharge was an alleged act of misconduct in the course of that activity, and the proof establishes that the employee was not in fact guilty of that misconduct.

I find, therefore, that Bunker was engaged in a protected activity in his discussion with Johann, and that the proof affirmatively establishes that he did nothing to forfeit that protection. His discharge for that activity violated Section 8(a)(1) under the **Burnup** case. In addition, I find that Mitchell in firing Bunker called him an "agitator." Cowan, who is still in the Company's employ, corroborated Bunker as to this, and I credit them over Mitchell's less-than-categorical denial. The race issue had not yet been injected into the conversation, and the term "agitator" appears to have referred to Bunker's union activity. I find, therefore, that Mitchell in discharging Bunker was also moti-

vated by a resentment of this activity, and therefore the discharge violated Section 8(a)(3) as well as Section 8(a)(1).

3. Cowan

Cowan's discharge apparently resulted from his participation in the conversation between Mitchell and Bunker. Mitchell testified that Cowan's opposition to the hiring of Negroes was likewise a factor, but although Mitchell was aware of this attitude as early as October 11, Cowan's timecard was still in place on October 13, after Bruning's, Sumrall's, and Galloway's had been removed, and Cowan did not learn of his discharge until the following morning.

Mitchell testified that Cowan said something during Mitchell's conversation with Bunker, that Mitchell asked Cowan, "What did you say," that Cowan replied "I wasn't talking to you," and that this reply showed so bad an attitude (Mitchell referred to it as "popping off") that he instantaneously determined to let Cowan go. On the other hand, Cowan and Bunker describe the episode as arising out of Mitchell's calling Bunker an "agitator," at which time Bunker asked Cowan if he heard the expression, Cowan replied "Yes, I heard it," and Mitchell turned on Cowan with "What have you got to do with this?" Piecing the three versions together, I find that Cowan answered that query by saying, "I wasn't talking to you," and Mitchell reacted as described above.

In the light of all the circumstances, I find that Mitchell's irritation at Cowan stemmed in substantial part from Mitchell's discovery that Bunker and Cowan were allied in the union matter to which Mitchell

referred when he called Bunker an "agitator." It follows, of course, that Cowan's discharge was likewise violative of Section 8(a)(3) and (1) of the Act.

Conclusion of Law

The Company by discharging Bruning, Bunker, Cowan, Galloway, and Sumrall under the circumstances and for the reasons described above engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

The Remedy

I shall recommend an order directing the Company to cease and desist from its unfair labor practices and from any other invasions of its employees rights under Section 7 of the Act. See **N.L.R.B.** v. **Entwistle Mfg. Co.**, 120 F. 2d 532, 536 (C.A. 4). Affirmatively, I shall recommend that the Company reimburse the five employees in question for losses incurred between October 14, 1965, and January 11, 1966, inclusive, under the formulas approved by the Board in **F. W. Woolworth Co.**, 90 NLRB 289, and **Isis Plumbing & Heating Co.**, 138 NLRB 716, and that it post appropriate notices.

Upon the foregoing findings of fact and conclusions of law, and upon the record as a whole I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

Hesmer Foods, Inc., its officers, agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Discharging or otherwise discriminating against any employee because of his membership in or support of Hotel & Restaurant and Bartenders International Union, AFL-CIO, or any other labor organization.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

(2) Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make Robert Bruning, James Bunker, Charles Cowan, Max Galloway, and Robert Sumrall whole in the manner described in the portion of the Trial Examiner's Decision entitled "The Remedy" for any loss of earnings suffered by reason of the discrimination against them.

(b) Preserve, and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms hereof.

(c) Post at its plant on Stockwell Road in Evansville, Indiana, copies of the notice attached hereto and marked Appendix. 4/ Copies of such notice to be fur-

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4/ In the event that this Order is adopted by the Board, the words "AN ORDER" shall be substituted for "A RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a United States Court of Appeals the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING" shall be inserted immediately preceding "AN ORDER."

nished by the Regional Director for the Twenty-fifth Region, shall after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Twenty-fifth Region, in writing, within 20 days from the date of the receipt of this Decision what steps the Respondent has taken to comply herewith. 5/

Dated at Washington, D.C.

Frederick U. Reel
Trial Examiner

5/ In the event that this Order is adopted by the Board, this provision shall be modified to read, "notify said Regional Director, in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX TXD-269-66

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A RECOMMENDED ORDER OF A TRIAL
EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

WE WILL pay Robert Bruning, James Bunker, Charles Cowan, Max Galloway, and Robert Sumrall for wages they lost between October 14, 1965, and January 11, 1966.

ALL OUR EMPLOYEES have the right to join or assist HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO, or any other union.

WE WILL NOT discharge or discriminate against employees, ir interfere with them in any way, because of their union activity.

HESMER FOODS, INC.
(Employer)

Dated..... By.....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana 46204 (Tel. No. 633-8921).

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JOHN F. DAVIS, CLERK

No. 1248

In the Supreme Court of the United States

OCTOBER TERM, 1967

HESMER FOODS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1967

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NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (App. 2)[1] enforcing the order of the National Labor Relations Board is not officially reported. The Board's decision and order (App. 5-6) are reported at 161 NLRB No. 45.

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[1] "App." refers to the Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, which petitioner has filed in this Court.

JURISDICTION

The order of the court of appeals was entered on November 17, 1967, and a decree was entered on December 20, 1967 (App. 2-4). On March 19, 1968, Mr. Justice Marshall extended the time for filing a petition for certiorari to and including March 29, 1968. The petition was filed on March 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer, in violation of the National Labor Relations Act, discharged five employees because of their union activity.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq*) are set forth at pp. 4-8 of the petition.

STATEMENT

Petitioner is a meat-packing company located in Evansville, Indiana. During October 1965, 22 employees worked at its Barbecue Division plant—3 or 4 on the night-shift, and the remainder on the day-shift. (App. 8; J.A. 48.) That plant also served as the Company's headquarters, so that Company President Edward Mitchell spent a lot of time there observing the work of the employees (J.A. 80).[2]

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[2] "J.A." refers to the joint appendix to the briefs in the court below.

Early in October 1965, James Bunker, a new night-shift employee, obtained authorization cards from the Union,[3] and proceeded to obtain the signatures of 6 other employees—including Charles Cowan, another night-shift employee, and day-shift employees Robert Bruning, Max Galloway, and Robert Sumrall (App. 9; J.A. 37-38, 45-46). During working hours and on Company premises, these 5 employees distributed union cards to other employees and solicited at least 12 of the plant's 22 employees to join the Union (App. 9; J.A. 53, 60, 67, 70).

On the evening of October 11, Cowan and President Mitchell had a conversation about the Company's intention to hire Negro employees for the first time. Cowan told Mitchell that some employees, including himself and Bunker, objected to Negroes working in the plant. (App. 9-10; J.A. 82-84.) The next night, Cowan and the other card signers attended a meeting at the home of a Union representative (App. 9; J.A. 38, 53).

About 4:00 p.m. the following day (October 13), as Bruning, Galloway, and Sumrall were about to punch out for the day, they found their time cards missing. Foreman Johann summoned them to his desk and told them that they were discharged because of unsatisfactory work (App. 11; J.A. 60-61, 67).

After listening to Johann's explanation, Galloway returned to the production area and told Bunker what had happened. With Galloway, Bunker returned to Johann's desk and asked if he could use the phone.

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[3] Local 388, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

Johann said yes, but, as Bunker was dialing, asked whom he was calling. When Bunker answered "The Union," an argument ensued in which both men became angry. (App. 12; J.A. 38-39, 54-55, 61.) However, at no time did Bunker threaten or menace Johann (App. 12, 22-23; J.A. 54-55, 67-68).

Bunker returned to work, and Johann went to Mitchell's office, where he reported that Bunker, using abusive language and gestures, had accused him (Johann) of discharging Sumrall, Galloway, and Bruning for engaging in union activity (App. 12; J.A. 85). Mitchell thereupon discharged Bunker, stating that he had been insubordinate and was an "agitator" (App. 12-13; J.A. 39, 72, 86, 98-99). Mitchell also accused Bunker of race prejudice, a charge which Bunker denied (App. 13; J.A. 86).

Bunker turned to Cowan, who was standing nearby, and asked whether he had heard Mitchell use the word "agitator," and Cowan replied that he had. Mitchell asked, "what have you got to do with this," to which Cowan replied, "I wasn't talking to you." Mitchell responded that Cowan would not have too much to say to him thereafter. (App. 13-14; J.A. 39-40, 72, 94-95.) The next day, Cowan was discharged (App. 16; J.A. 72).

All five dischargees received identical termination notices. The reasons for unemployment were listed as: "Work was not satisfactory," and "Insubordination" (App. 16; J.A. 25).

The Board, adopting the findings of its Trial Examiner, concluded that the Company had discharged Cowan, Bunker, Bruning, Galloway, and Sumrall be-

cause of their union activity, in violation of Section 8(a)(3) and (1) of the Act (App. 5-6, 16-25). These conclusions relied, *inter alia*, on the circumstances that the Company was admittedly opposed to the Union;[4] it was aware of the dischargees' union activity, since the plant was small and they had openly engaged in such activity there; and the reasons that the Company advanced for the discharges—alleged incompetence and animus towards integration of the work force—did not withstand analysis.[5] The Board ordered the Company to cease and desist from the unfair labor practices found, to reinstate the discriminatees with back pay, and to post appropriate notices (App. 6, 25-27). The court of appeals enforced the Board's order in full (App. 3-4).

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[4] During December 1965, the Company distributed mimeographed letters to its employees, stating that it was "opposed to the union," and that it was its "positive intention" to "prevent it from coming into . . . [the] company" (J.A. 27-29).

[5] Foreman Johann told Bruning, Galloway, and Sumrall that they were discharged because of unsatisfactory work. But Galloway had received a wage increase the week before and none of the three had previously been criticized for poor work (App. 11; J.A. 52, 56, 64). The Examiner refused to credit President Mitchell's testimony that racial prejudice motivated the discharges because, *inter alia*, there was no evidence that these three employees (who were on the day-shift) were anti-Negro; although Mitchell had first hand awareness of Cowan's prejudice and reason to believe that Bunker was also prejudiced, he admitted that he had not decided to fire Bunker until he heard of Bunker's "insubordination" (J.A. 90-91), and Cowan was not terminated until after he had aligned himself with Bunker in that incident; and the Company had not called Foreman Johann as a witness to confirm Mitchell's testimony as to his conversation with Johann (App. 16-19).

ARGUMENT

The petition, in essence, merely presents the question whether five employees were discharged for union activity or for good cause. Such an evidentiary issue does not warrant further review. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, the facts summarized in the Statement constitute ample evidentiary support for the Board's findings.[6]

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[6] Contrary to petitioner's contention (Pet. 12), that Foreman Johann was available to both parties does not mean the Examiner erred in drawing an adverse inference from the Company's failure to call him as a witness. See *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226.

Nor is there error (see Pet. 13) in inferring employer knowledge of union activity from the circumstance that the employees openly engaged in union activity in a "small plant." The case cited by petitioner holds exactly to the contrary. See *National Labor Relations Board* v. *Joseph Antell, Inc.*, 358 F. 2d 880, 882-883 (C.A. 1).

And, expressions of anti-union animus, which are not in themselves unlawful, may be used to establish an illegal motivation for other conduct. See *Revere Camera Co.* v. *National Relations Board*, 304 F. 2d 162, 165 (C.A. 7) (see Pet. 14-15).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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